RE YEAP CHEE FUN, EX P PERNAS TRADING SDN BHD

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
[BANKRUPTCY NO: 29-1005-1997]
13 JANUARY 2000

BANKRUPTCY: *Notice - Substituted service - Whether null and void - Whether there was attempted service on judgment debtor at last known address - Whether there was failure to comply with Practice Note No 1 of 1968 - Whether personal service could be effected - Whether judgment debtor evading service - Whether service nullified if judgment debtor unaware of notice*

CIVIL PROCEDURE: *Affidavits - Failure to give notice to use affidavit filed in previous proceeding contrary to O. 32 r. 13(a)(b) Rules of the High Court 1980 - Whether court has a discretion to allow or not to allow affidavit - Whether prejudice to other party if affidavit allowed - Whether inconvenience caused*

CIVIL PROCEDURE: *Affidavits - Exhibit - Documents lumped together as one exhibit to save on stamp fee - Whether exhibit admissible - Rules of the High Court 1980, O. 41 r. 11*

The Deputy Registrar dismissed the application of the judgment debtor ('JD') to nullify the order for substituted service of the bankruptcy notice ('BN') on him. Hence, the instant appeal.

The judgment creditor ('JC') raised two preliminary objections: (i) that the JD failed to give notice to use an affidavit filed in the previous proceeding pursuant to O. 32 r. 13(a)(b) of the Rules of the High Court 1980 ('RHC'); and (ii) that the JD should not admit exhs. YCF-1 and YCF-3 as evidence contrary to O. 41 r. 11 RHC.

In support of the application, the JD argued, *inter alia*, that: (i) there was a failure to attempt service at his last known address; (ii) there was a failure to comply with Practice Note No. 1 of 1968 ('the practice note'); (iii) there was no evidence that personal service could not be effected or that the JD was evading service; and (iv) that there was no effective service as the JD was not aware of the bankruptcy notice ('BN').

Held:

[1] The court has a discretion whether to allow or not to allow an affidavit filed in an earlier proceeding in the current proceeding. Although the said affidavit was in another file, it was in the earlier proceeding leading

to the present bankruptcy petition. There was neither prejudice nor inconvenience caused if the said affidavit was allowed to be referred to. As such, the JD should not be prevented from referring to the said affidavit.

[2] Order 41 r. 11 RHC requires every exhibit to an affidavit to be identified by a certificate. The JD was trying to save on stamp fee when he lumped the documents together as exhs. YCF-1 and YCF-3. If the documents were marked individually, he would have had to pay a separate fee for each document. Although such a practice was not approved, the JD should not be penalised for it. However, if the practice became rampant, a more serious view would have to be taken.

[3] There was no evidence that the JD informed the JC of his change of address. From the chronology of events, it appeared that the JD was evading service. Thus, there was no merits on the ground that there was a failure to attempt service on the JD at his last known address.

[4] The practice note is intended to make sure that a defendant knows of a process of the court that is to be served on him. It is aimed at preventing a plaintiff from abusing the process of the court. But where a debtor is on the run, *etc*, it would be naive to require the minute details of that practice note to be followed. It is sufficient if it is substantially followed. A practice note is not law. It is merely a direction for administrative purpose. In any event, there was no serious non-compliance with the substantive requirement of the practice note.

[5] On the issue that there was no evidence that personal service could not be effected or that the JD was evading service, the chronology of events showed very clearly that the JD was evading service.

[6] There was no proposition of law that where the JD was not aware of the bankruptcy notice, service was not effected. Where an order for substituted service is made, the issue is not whether the JD knows about the bankruptcy notice or not, but whether the order for substituted service is correctly made and whether the subsequent service is in accordance with the order. The JD may or may not know about it at the time when the substituted service is made. No actual knowledge need to be proved. The fact that the JD is not aware of the bankruptcy notice, even if it is true, does not nullify service.

[6a] There was no doubt that the JD was aware of the proceeding. Otherwise, he could not have filed this application about two months after service by way of substituted service and advertisement.

[7] There was no merits in the appeal. It was no more than an attempt to delay the proceeding after the JD could not avoid service anymore.

[Appeal dismissed.]

Case(s) referred to:

Koh Thong Kuang v. United Malayan Banking Corporation Bhd [1994] 4 CLJ 488 ***(foll)***

Malayan United Finance Bhd v. Sun Chong Construction Sdn Bhd & Ors [1995] 4 MLJ 741 ***(refd)***

Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor [1995] 4 CLJ 484 ***(refd)***

Legislation referred to:

Bankruptcy Rules 1969, r. 110(1), (c)

Rules of the High Court 1980, O. 32 r. 13(a)(b), O. 41 r. 11

For the appellant - Wong King Fun; M/s Wong-Chooi & Mohd Nor

For the respondent - Lim Su Kun; M/s Murad & Foo

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Mohamad J:

To get a clearer picture of this proceeding I shall first set out the chronology of events.

The judgment creditor caused the bankruptcy notice to be issued on 24 December 1997. Three attempts were made to serve the notice, but on all occasions the process server was told that the judgment debtor had gone out. So, on 6 February 1998, the process server affirmed an affidavit of non-service.

On 18 February 1998, the judgment creditor filed a summons-in-chambers for an order of substituted service. An order was obtained on 2 April 1998.

Between 15 May 1998 and 29 May 1998 the judgment creditor served the bankruptcy notice by posting it on the court's notice board, on the judgment debtor's premises and by advertisement.

Creditor's petition was filed on 2 July 1998. Two attempts were made on 11 August 1998 and 13 August 1998 to serve the creditors petition on the judgment debtor but on both occasions the process server was told that the judgment debtor had gone out. Notice of appointment was given on 17 August 1998 for an appointment on 22 August 1998. On that day, again the process server was told that the judgment debtor had gone out.

Five days after the appointed date, on 27 August 1998 the judgment debtor filed this summons-in-chambers (encl. 14) and notified that his present address is at No. 26, Tingkat Kikik 6, Perai, Taman Inderawasih, 13800 Butterworth, Penang ("the new address").

Even though this appeal only concerns the application in encl. 14 which only affects the bankruptcy notice. I think I should give a complete chronology of what happened even after that.

Having been told of the new address of the judgment debtor, between 11 September 1998 and 12 November 1998, three attempts were made to serve the creditor's petition at the new address given by the judgment debtor. Again on all the three occasions the process server was told that the judgment debtor had gone out.

On 13 November 1998 the judgment creditor's solicitors informed the judgment debtor's solicitors that the former will proceed with the application for substituted service if their client does not come forward to accept service. A reminder was sent on 26 November 1998.

On 7 December 1998 the judgment creditor filed a summons-in-chambers for an order of substituted service of the creditor's petition.

On 14 January 1999 and 26 January 1999 the solicitors for the judgment creditor wrote to the solicitors for the judgment debtor urging the judgment debtor to accept service before the hearing date of the application for substituted service. On 28 January 1999 the application was heard. But the Senior Assistant Registrar adjourned it to 25 February 1999 to give one final chance to the judgment debtor to accept service, the wisdom of which I cannot understand.

However on 23 February 1999 the creditor's petition was served on the judgment debtor at the office of his solicitors.

By encl. 14, the judgment debtor seeks various orders giving numerous grounds, including some that are very technical and trivial. From the chronology of events it is clear that the judgment debtor had been evading service and, when he could not avoid it anymore, is now turning to the rules to nullify the order for substituted service, the service and everything that follows.

It was argued that the order for substituted service were "null and void, irregular, invalid, defective, wrongfully obtained ... ." Six "grounds" were given. They are:

(a) failure to attempt service on the judgment debtor ("JD") at his last known address;

(b) Failure to comply with Practise Note No. 1 of 1968;

(c) in contravention of r. 110(1) of the Bankruptcy Rules 1969;

(d) consist of useless/insufficient/ineffective/irregular/wrong modes of substituted service;

(e) Having been tainted with misrepresentation of material fact;

(f) no effective service (as JD) was not aware of the B.N.

The deputy registrar dismissed the judgment debtor's application. Hence this appeal.

Learned counsel for the judgment creditor raised two "preliminary objections" against the appeal. The first is the failure on the part of the judgment debtor to give notice to use an affidavit filed in the previous proceeding as required by O. 32 r. 13(a)(b) of the Rules of the High Court 1980 (RHC 1980). The judgment debtor seeks to use an affidavit filed by him a proceeding for summary judgment in Civil Suit No. 22-139-95 between the judgment creditor (plaintiff) and the judgment debtor (defendant). In that affidavit the judgment debtor had given the address "No. 26, Tingkat Kikik 6, Perai, Taman Inderawasih, 13800 Butterworth" as his address. The judgment debtor is relying on the address given in that affidavit to say that the process server did not attempt to serve on him at his correct address.

The rule is not an inflexible one. The court does have a discretion whether to allow or not to allow an affidavit filed in an earlier proceeding in the current proceeding. My practice has been that if the affidavit is to be found in the same file, even in another application, I would usually allow the party to refer to the affidavit. Both parties are aware of the existence of the affidavit and its contents. The opposite party is not prejudiced as, most likely, a reply to that affidavit has already been filed. No inconvenience is caused, as the affidavit is to be found in the same file, may be just a few enclosures earlier.

The consideration might be different if the affidavit is in another action in another file. At the very least it is inconvenient to the court that has to call for the other file. It may also cause inconvenience to the other party. Furthermore, it would not be very difficult for the deponent to file and serve a fresh affidavit in the new proceeding.

In this case, the affidavit sought to be referred to was filed in the civil suit in which the judgment creditor obtained summary judgment which now forms the basis of this bankruptcy proceeding. No doubt it is in another file but in the earlier proceeding leading to the present bankruptcy petition. But, in this petition, the defendant has filed an affidavit in which he enclosed the earlier affidavit that he wants to refer to. Further more it is only with regard to his address. There is neither prejudice nor inconvenience caused if the earlier affidavit is allowed to be referred to. So, while I urge solicitors to comply closely with the rules, I do not think that in the circumstances of this case I should prevent the judgment debtor from referring to that affidavit.

The other preliminary objection was that the exhs. YCF1 and YCF3 of encl. 13 of Civil Suit No. 22-139-95 should not be admitted as evidence, because the judgment debtor had infringed O. 41 r. 11 RHC 1980. The rule requires that every exhibit to an affidavit must be identified by a certificate. What the judgment debtor had done was to lump together the writ of summons, the summons-in-chambers, the affidavit in support of the summons-in-chambers, the judgment, the order, the notice of appeal, the memorandum of appeal, letter from the solicitors of the judgment debtor, an affidavit in reply as one exhibit marked as exh. "YCF1". The reason is not difficult to understand: they are trying to save the stamp fee that they have to pay. If they mark each document individually they will have to pay a separate fee for each document.

Regarding exh. "YCF 3", similarly a number of documents were lumped together and marked as one exhibit, for the same reason.

Whereas I do not approve such a practice and I hope solicitors will desist from doing the same in future, I do not think that, for now, I would want to penalise the judgment debtor for it. However, if the practice becomes more rampant I might have to take a more serious view about it.

I shall now consider the application on its merits.

Coming now to the grounds given by the judgment debtor. First, it was said that no attempt was made to serve on him at his last known address. In that affidavit, he merely gave the "new address" as his address. He said nothing more. There is no evidence that he had informed the judgment creditor of his change of address. Indeed, from chronology of events it appears that he was evading service. I have seen cases where a person in a similar situation as the judgment debtor filing affidavits giving different addresses at about the same time. It would be naive for the court not to take note of such incidents. Furthermore, as was affirmed by the process server every time he went to

the "old address", he was told by the resident that the judgment debtor had gone out, and not that he had shifted. The letters of appointment sent to the "old address" were never returned to the sender on the ground that the addressee had moved out. The truth is the judgment debtor was evading service as he is now evading process of the court. This ground has no merits.

Secondly, it was said that the judgment creditor has failed to comply with Practice Note No. 1 of 1968. That practice note was copied wholesale from the 1957 White Book. There is no doubt that it is a good practice, provided of course, that we are dealing with "gentlemen", but we do not expect real "gentlemen" to evade service. It is intended to make sure that a defendant really gets to know of a process of the court that is to be served on him. It is aimed at preventing a plaintiff from abusing the process of the court, for example, by taking a default judgment (later) when in fact the defendant really does not know of the proceeding against him. But, where a debtor (I am speaking generally) is on the run, where the process server's arrival at the known address is greeted with high wall, locked gate and fierce dogs, where, if anybody comes out at all, it is only to say "He is not in and slam the door, it would be naive to require the minute details of that practice note to be followed. It is sufficient if it is substantially followed. After all, a practise note is not law, it is merely a direction for administrative purpose – see *Malayan United Finance Bhd. v. Sun Chong Construction Sdn. Bhd. & Ors* [1995] 4 MLJ 741, *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn. Bhd. & Anor* [1995] 4 CLJ 484 (CA). The Supreme Court in *Koh Thong Kuang v. United Malayan Banking Corporation Bhd.* [1994] 4 CLJ 488; [1994] 3 MLJ 509 has very aptly said that the Practise Note No. 1 of 1968 should not be applied blindly.

In any event, I do not see any serious non-compliance with the substantive requirement of that practice note.

Next, it was argued that r. 110(c) of the Bankruptcy Rules 1969 was breached. What I can make out from the submission is that there is no evidence that personal service could not be effected or that the judgment debtor was evading service.

With respect I do not agree with the submission. The chronology of events shows very clearly that the judgment debtor was evading service. What else could the judgment creditor do?

Grounds (d) and (e) are either repetitive, rhetoric or lack any substance or merit altogether.

Ground (f) says that service was not effected because the judgment debtor was not aware of the bankruptcy notice.

I am not aware of any such proposition of law. Where an order for substituted service is made the issue is not whether the judgment debtor knows about the bankruptcy notice or not, but whether the order for substituted service is correctly made and the subsequent service is in accordance with the order or not. The judgment debtor may or may not know about it at the time when the substituted service is made. No actual knowledge need be proved. The fact that the judgment debtor is not aware of the bankruptcy notice, even if it is true, does not nullify service.

I am happy to note that the Supreme Court in *Koh Thong Kuang v. United Malayan Banking Corporation Bhd.* [1994] 3 MLJ 509 had taken a very pragmatic approach when it held that:

> (2) From the evidence, the bank was justified in concluding that the appellant was deliberately evading service and was entitled to serve the bankruptcy notice at his last-known address although it was clear that he was no longer residing there. The fact that the appellant was able to affirm his affidavit two days after substituted was effected demonstrated the efficacy of the substituted service procedures provided by the rules.

In the present case too there is no doubt whatsoever that the judgment debtor was aware of the proceeding. Otherwise he could not, about two months after the service by way of substituted service and the advertisement, have filed this application (encl. 14) on 27 August 1998.

I see no merits whatsoever in the appeal. It is no more than an attempt to delay the proceeding after the judgment debtor could not avoid the service anymore.

I accordingly dismissed the appeal with costs.